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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

DOMINIQUE EVANS, Plaintiff and Appellant, v. KDF CITY TOWERS LP et al., Defendants and Respondents.	A130917 (Alameda County Super. Ct. No. RG07344884)

I. INTRODUCTION

This case arises out of the tragic death of a three-year-old girl after she fell from a window in her eighth-floor apartment. Dominique Evans, the girl's mother, appeals from a summary judgment entered in favor of the owners and managers of the apartment building.[1] Evans maintains there are triable issues of fact regarding whether the window was unsafe and whether the owners/managers breached their duty of care to provide "reasonably safe windows." We affirm.

II. BACKGROUND

Evans, her three-year-old daughter, Tia Simmons (Tia), and her younger son lived in a two-bedroom apartment on the eighth floor of City Towers Apartments in Oakland. On the afternoon of November 19, 2006, Evans was supervising four children at her apartment, including Tia, when she learned her grandmother was in the hospital. Around

[1] Respondents are KDF City Towers, LP, VPM Management, Inc., Affordable Housing Access, Inc., and KDF Communities-City Towers, LLC., the owners and managers of the City Towers Apartments (collectively, KDF).

5:15 p.m., she asked her friend, Nicole Smith (Smith), to watch the children while she went to the hospital. When Smith arrived with her own two children, the apartment smelled like marijuana smoke. Before Evans left the apartment, "she opened the window in her bedroom about 'halfway' which was 'enough for someone to fall from it.' "

After Evans left the apartment, Smith checked on the children, who were watching television in Tia's bedroom. Smith then sat in the living room with her baby, eating and watching television. Tia came out once to ask Smith for water, then returned to her bedroom. Smith did not see Tia go into Evans's bedroom. Shortly thereafter, Tia fell out of Evans's bedroom window and suffered fatal injuries.

Evans's bedroom had one window, the lower edge of which was 35 inches high. Evans admitted that "[a]lthough [she] could have positioned her bed several feet away from the window . . . [she] chose to place it next to the window." She "elevated her bed on milk crates, so that the top of her bed was even with the bottom of the window sill . . . [¶] . . . [¶] . . . [because] she 'always like[d] to be higher.' " The bedroom window "was equipped with a screen," which fell out during the incident.

Evans identified no maintenance problems with the windows when she moved into the apartment. About one year after she moved in, Evans asked the property manager why there was no protection on the windows, and was told bars would be a hazard in case of fire. Evans did not ask for bars to be installed, and " 'never thought about it again really.' "

In opposition to KDF's motion for summary judgment, Evans submitted the declaration of Brad Avrit, a licensed civil engineer. Avrit opined "the subject window constituted an unsafe condition that presented a significant danger to human life." "Given that the screen would fall out with only minimal application of force, the window in an open position essentially constituted an inadequately guarded 39-1/2 inch by 58-1/2 inch opening with a fall height in excess of 80 feet." He further opined respondents were in violation of Oakland Municipal Code section 15.04 because it incorporates the California Building Code, including the requirement buildings must be " 'maintained in a safe and sanitary condition.' "

The trial court granted KDF's motion for summary judgment, and judgment was entered on December 14, 2010. This timely appeal followed.[2]

III. DISCUSSION

A. *Standard of Review*

Summary judgment is properly granted when no triable issue of material fact exists and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) A defendant moving for summary judgment bears the initial burden of showing that a cause of action has no merit by showing that one or more of its elements cannot be established or that there is a complete defense. (*Id.*, subds. (a), (o)(2).) Once the defendant has met that burden, the burden shifts to the plaintiff "to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto." (*Id.*, subd. (p)(2).) " 'There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof.' " (*Madden v. Summit View, Inc.* (2008) 165 Cal.App.4th 1267, 1272, quoting *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) We review the grant of a summary judgment de novo. (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476.)

B. *The Elements of Negligence*

"The threshold element of a cause of action for negligence is the existence of a duty to use due care toward an interest of another that enjoys legal protection against unintentional invasion. [Citations.] Whether this essential prerequisite to a negligence cause of action has been satisfied in a particular case is a question of law to be resolved by the court." (*Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370, 397.) "We are mindful that the concept of duty is ' "a shorthand expression of a conclusion, rather than an aid to analysis in itself," ' and constitutes 'the result of all the policy considerations leading the law to say that a particular plaintiff is entitled to protection.' (5 Witkin, Summary of Cal.

[2] Tia's father, Henry Simmons, Jr., brought a separate wrongful death action against KDF and others, which was consolidated with Evans's lawsuit. KDF's motion for summary judgment in regard to his claims was also granted, but he has not appealed.

Law (10th ed. 2005) Torts, § 6, p. 49.)" (*Lawson v. Safeway, Inc*. (2010) 191 Cal.App.4th 400, 409.)

"In this state, the general rule is that all persons have a duty to use ordinary care to prevent others from being injured as the result of their conduct." (*Randi W. v. Muroc Joint Unified School Dist*. (1997) 14 Cal.4th 1066, 1077 (*Randi W.*), citing *Rowland v. Christian* (1968) 69 Cal.2d 108, 112 (*Rowland*)[3].) "Everyone is responsible, not only for the result of his or her willful acts, but also for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself or herself." (Civ. Code, § 1714, subd. (a).)

" '*Rowland* enumerates a number of considerations . . . that have been taken into account by courts in various contexts to determine whether a departure from the general rule is appropriate: "the major [considerations] are the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved." ' " (*Randi W., supra*. 14 Cal.4th at p. 1077, quoting *Rowland, supra*, 69 Cal.2d at p. 113, italics omitted.)

"[T]he chief element in determining whether defendant owes a duty or an obligation to plaintiff is the foreseeability of the risk . . . ." (*Dillon v. Legg* (1968) 68 Cal.2d 728, 740.) However, "a court's task—in determining 'duty'—is not to decide whether a *particular* plaintiff's injury was reasonably foreseeable in light of a *particular* defendant's conduct, but rather to evaluate more generally whether the category of negligent conduct at issue is sufficiently likely to result in the kind of harm experienced

[3] Partially superseded by statute on other grounds as stated in *Perez v. Southern Pacific Transportation Co.* (1990) 218 Cal.App.3d 462, 467.

that liability may appropriately be imposed on the negligent party." (*Ballard v. Uribe* (1986) 41 Cal.3d 564, 573, fn. 6.)

"[C]ourts have repeatedly declared the existence of a duty by landowners to maintain property in their possession and control in a reasonably safe condition." (*Vasquez v. Residential Investments, Inc*. (2004) 118 Cal.App.4th 269, 278; see also *Schlemmer v. Stokes* (1941) 47 Cal.App.2d 164, 167.) "[T]raditional tort principles impose on landlords . . . a duty to exercise due care for the resident's safety in those areas under their control." (*Frances T. v. Village Green Owners Assn*. (1986) 42 Cal.3d 490, 499.) "[T]he legal issue of duty should focus on the specific measures the plaintiff claims the landlord had the duty to undertake because the efficacy and burdensomeness of any proposed duty can only be evaluated by examining those specific measures." (*Vasquez v. Residential Investments, Inc., supra,* 118 Cal.App.4th at p. 282, fn. 6)

Evans maintains KDF had a duty to "adopt[] *reasonable precautions* to prevent young children from toppling out of windows," relying on *Amos v. Alpha Property Management* (1999) 73 Cal.App.4th 895, 898 (*Amos*). In *Amos*, a two and a half year-old boy was injured after falling "out of a low, open, unprotected window in a common passageway on the second floor of his apartment building." (*Id*. at pp. 896-897.) The boy was being watched by a neighbor who placed him in front of the television and then went into her kitchen. (*Id*. at p. 897) A few minutes later, the neighbor heard "someone yell a baby had fallen out a window" that was " 'always open' " in the hallway. (*Ibid*.) The court held landlords have " 'a duty to exercise due care for the residents' safety in those areas under their control' (*Frances T. v. Village Green Owners Assn*.[, *supra*,] 42 Cal.3d 490, 499 . . .)" and "that this duty includes within its scope adopting *reasonable precautions* to prevent young children from toppling out of windows in common areas of the building." (*Id*. at p. 898.)

There is a critical difference between the circumstances in *Amos* and this case: the window from which the child fell in *Amos* was in a common area of the building under the landlord's control. (*Amos, supra,* 73 Cal.App.4th at pp. 897-898.) *Amos* recognized this distinction in its formulation of the landlord's duty as including taking "*reasonable*

precautions to prevent young children from toppling out of windows in *common areas of the building*." (*Ibid.*, second italics added.) *Amos* rejected the notion that a landlord "had a duty to assure no child could fall from an upper story window under any circumstance" noting "[l]andlords are not insurers of their tenants' safety [citation] and are not required to make their premises absolutely 'child proof' by providing every possible safeguard against injury to children on their premises." (*Id*. at p. 898, fn. 1, citing *Pineda v. Ennabe* (1998) 61 Cal.App.4th 1403, 1405 (*Pineda*).)

Pineda, in contrast, involved circumstances similar to those in this case. In *Pineda*, a five and a half year-old child was injured after she fell out of a second story window in her own apartment. (*Pineda, supra*, 61 Cal.App.4th at p. 1405.) The lower edge of the window was 44 inches above the floor, but the child's mother "had placed a bed, consisting of a mattress on a box spring, directly under the window." (*Ibid*.) "There was another location in the bedroom, away from the window, suitable for placement of the bed." (*Ibid*.) The child was bouncing on the bed before the accident "without adult supervision." (*Ibid.*)

In opposing summary judgment, the *Pineda* plaintiffs offered expert testimony that the "risk that children will fall out a window is well known; screens create a false sense of security in parents, who assume the screen may protect against such incidents; labels are available which warn of this hazard, as are devices to prevent screens from being dislodged by children; bars or grates can be installed to protect against the hazard of falling out; tenants can be warned not to put furniture near windows; landlords should rent ground floor apartments to families with small children . . . ." (*Pineda, supra*, 61 Cal.App.4that p. 1405.)

The Court of Appeal affirmed summary judgment in favor of the landlord, holding a "landlord has *no duty* of care to assure that his tenant's children do not fall out of ordinary second story windows." (*Pineda, supra,* 61 Cal.App.4th at p. 1405. italics added.) "The purpose for requiring a duty as a precondition to negligence liability, and for requiring the *court* to delineate the boundaries of the duty, is to avoid the extension of liability to every conceivably foreseeable accident, without regard to common sense or

good policy. Common sense and good policy militate against requiring landlords to provide a safety net to reduce risks fundamentally caused by careless parents." [4] (*Id.* at p. 1409.)

Evans claims *Pineda* is not controlling because it involved an "ordinary window," while in this case "the particular configuration of the window . . . was unsafe and unreasonably dangerous."[5] Nothing in the undisputed facts suggests the window involved in the accident was anything but the kind of "ordinary" window involved in *Pineda*. Both windows were in the bedrooms of the plaintiffs' apartments, not in a common area. (*Pineda, supra,* 61 Cal.App.4th at p. 1405.) Both windows had screens which fell out when the child did. (*Ibid.*) Both bedrooms were configured in such a way that the bed did not have to be placed under the window, yet both mothers did so.[6] (*Ibid.*)

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[4] Courts in California and other states have held landlords generally owe no duty to a tenant to install child-proof window screens or other protections against a child falling out of a window in the apartment in which the child resides, and that normal window screens are intended not prevent children from falling out, but to prevent entry of insects. (*Schlemmer v. Stokes, supra,* 47 Cal.App.2d at p. 167 [landlord not liable for baby falling through screened window because "[i]t is a matter of common knowledge that a screen is not placed in a window for the purpose of keeping persons from falling out"]; *Lamkin v. Towner* (1990) 138 Ill.2d 510, 519-520 ["no duty on the part of a landlord to maintain in any window of an apartment he leases to tenants a screen sufficiently strong to support the weight of a tenant's minor child"]; *Riley v. Cincinnati Metropolitan Housing Authority* (1973) 36 Ohio App.2d 44, 48 [landlord had no duty to install screens that would prevent children from falling through window].)

[5] Evans also maintains *Pineda* is distinguishable because it was "predicated on a failure to warn against or to forestall the negligence of someone other than the landlord." The complaint in this case, however, alleged a failure to warn, and Evans admitted she alleged KDF did not " 'warn tenants and guests of the unreasonably dangerous conditions of such windows and the unreasonable risk of falling.' "

[6] Evans asserts the trial court erred in sustaining the objection to the portion of her declaration in which she stated the dimensions of her current apartment and the size and placement of the window were "identical" to those in the apartment from which Tia fell. Her declaration also stated photographs of her current apartment were attached, but the court found they were not. The court correctly held there was no foundation for Evans's statement that the two apartments were "identical," and thus did not consider Avrit's declaration "to the extent it [was] based on inadmissible evidence from Evans."

Both windows were large enough for a child to fall through. (*Ibid*.) Neither window had bars or other devices to prevent a child from falling out the open window.[7] (*Ibid.*)

Foreseeability is the basis of the distinction between a landlord's duty regarding windows in common areas over which the landlord has control as opposed to windows inside a tenant's apartment. It is simply not reasonably foreseeable that a tenant with a small child would place a bed under an eighth-floor window, raise it to the level of the window with milk crates, open the window wide enough for a person to fall through, and then fail to ensure the child was sufficiently supervised that she would not fall out the window. As in *Pineda*, KDF had "no duty of care" to assure tenant's children do not fall out of ordinary windows in their own apartments, and no duty to "provide a safety net to reduce risks fundamentally caused by careless parents."[8] (*Pineda, supra,* 61 Cal.App.4th at pp. 1405, 1408-1409.)

IV. DISPOSITION

The judgment is affirmed.

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[7] Evans also suggests the "heater affixed to the wall with a flat top and positioned beneath the window sill" in her bedroom made the "window configuration" unsafe. There was no evidence, however, that the portion of the heater underneath the window was not blocked by the bed Evans admitted placing along the wall under the window and elevated by milk crates "so that the top of her bed was even with the bottom of the window sill."

[8] Evans claims the fact a child fell from a window in City Towers in 1990 "makes the incident in this case foreseeable." But there was no evidence the KDF defendants, who purchased the apartments in 2003, had any actual notice of the prior incident 13 years earlier.

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Banke, J.

We concur:

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Marchiano, P. J.

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Margulies, J.